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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 698

H. GORDON HOWARD,
Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

PETITION FOR WRIT OF CERTICRARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, H. Gordon Howard, respectfully prays for a Writ of Certiorari directed to the Supreme Court of the State of Colorado to review judgments of that court, suspending and disbarring the petitioner from the practice of law within the State of Colorado, which deprived the petitioner of his constitutional right of due process of law and equal protection of the laws as guaranteed him by Section 1 of the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The opinions of the Colorado Supreme Court are reported at 140 Colo. 151, 342 P.(2d) 635 and ___ Colo. ___, 364 P.(2d 380, and are printed in Appendices A and B to this petition.

JURISDICTION

The judgments of the Supreme Court of Colorado sought to be reviewed are the Suspension Order of August 10, 1959 (Appendix A), and the judgment disbarring petitioner on August 21, 1961 (Appendix B), each entered on the day decreed. A petition for rehearing was denied by the Supreme Court of Colorado on September 5, 1961 (Appendix C) and the time within which to petition for certiorari was extended by this Court to February 2, 1962, by order signed by Mr. Justice Whittaker on December 4, 1961.

The jurisdiction of the Supreme Court of the United States is invoked under Amendment XIV, Section 1 of the Constitution of the United States and the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C. 1257.

I. THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the following procedures, individually or collectively, prevented a Disciplinary Proceeding against an attorney from being a fair hearing as guaranteed by the due process clause of the Fourteenth Amendment of the Constitution of the United States and therefore vitiated the Court's suspension from the Bar and disbarment of said attorney based thereon:

   a. Proceeding with notice to the attorney only of charges, not of misconduct, but merely of the existence of certain records and the occurrence of certain events which make it "appear" that he was guilty of misconduct;

b. Permitting the prosecutor to base his case entirely upon the Court's records of two unrelated civil actions against said attorney involving some of the same facts but different parties, different issues, a less exacting burden of proof, and different kinds of relief than those of the Disciplinary Proceeding, thereby depriving the attorney of an opportunity to confront, cross-examine, and impeach his accusers and otherwise demonstrate the unreliability of their testimony;

c. Permitting the prosecutor, in his opening statement, to read the hearing Court's opinions in said two unrelated civil cases;

d. Giving probative weight to evidence and findings of the same Court in said cases.

2. Whether the procedures recited in the question first stated, all of which were in violation of the applicable Colorado law under its Rules of Civil Procedure, case law, statutes, and or Constitution, individually or collectively denied an attorney in a Disciplinary Proceeding against him the equal protection of the laws guaranteed by the Fourteenth Amendment so that the Court's suspension from the Bar and disbarment of him based thereon were unconstitutional and invalid.

II. CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment XIV:

"Section. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny any person within its jurisdiction the equal protection of the laws."

Act of May 31, 1870, c. 114, § 16, 16 Stat. 144, 42 U.S.C. 1981:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Colorado Constitution, Article II:

"Section 6. Courts of justice shall be open to every person and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay."

"Section 25. No person shall be deprived of life, liberty or property, without due process of law."

Colorado Revised Statutes, 1953, Chapter 12, Article 1:

"Section 8 . . . the justices of the supreme court in open court, at their discretion, shall have power to strike the name of any attorney or counselor at law from the roll for malconduct in his office."

"Section 9. Every attorney, before his name is stricken off the roll, shall receive a written notice from the clerk of the supreme court, stating distinctly the grounds of complaint, or the charges exhibited against him, and, after such notice, he shall be heard in his defense, and allowed reasonable time to collect and prepare testimony for his justification."

III. CONCISE STATEMENT OF THE CASE

On July 9, 1959, the People of the State of Colorado, hereinafter referred to as the respondent, through the Attorney General of that State, filed a Formal Complaint with the Supreme Court of the State of Colorado seeking disciplinary action against the petitioner herein, H. Gordon Howard, a member of the Bar of that Court since September 26, 1938. The Complaint did not charge petitioner with any misconduct or unprofessional behavior, but alleged the existence of certain records and the occurrence of certain events which make it "appear" that the petitioner was guilty of misconduct. (See Appendix D of this petition for the full Complaint.) The Complaint was accompanied by a petition to require petitioner herein to show cause why his license to practice law should not be suspended during the pendency of the Disciplinary Proceeding being instituted. Petitioner filed timely Motions to Strike and to Dismiss the Formal Complaint as insufficient.

The Citation to Show Cause was duly issued, and, on August 3, 1959, a hearing was held in the Chambers of the Supreme Court of the State of Colorado upon the question of petitioner's suspension pending the outcome of the Disciplinary Proceeding. The only evidence presented at this hearing was the testimony of the petitioner herein denying at length all charges except that he had been privately reprimanded (for an unstated reason) by that Court shortly after entering practice about twenty years prior to this hearing. (R. 460 to 500).

On August 10, 1959, the Court denied petitioner's Motions to Strike and to Dismiss and suspended his right to practice law until final disposition of the mat-

ter in full. (See Appendix A). The apparent basis therefor was probative weight given by the Court to evidence and findings in its records of the two unrelated civil actions (of which it took judicial notice) of *Howard* v. *Hester*, 139 Colo. 255, 338 P.(2d) 106 (1959) and *Howard* v. *International Trust Company*, 139 Colo. 314, 338 P.(2d) 689 (1959). The petitioner was a defendant in those two cases involving some of the same facts, but parties and issues were not the same as in the instant proceeding, a less exacting burden of proof was required and the types of relief desired were altogether different.

Among the motions made by the petitioner following this ruling was a Motion to Vacate Order of Temporary Suspension filed on August 25, 1959 which urged that petitioner's rights guaranteed by the Fourteenth Amendment to the Constitution of the United States were being violated (see R. 510 to 512), and this contention was made by the petitioner throughout the remainder of the Disciplinary Proceeding and in his Petition for Rehearing at its conclusion; said Motion and Petition were denied.

The matter was referred to the Grievance Committee of the Supreme Court of the State of Colorado which held hearings in February and March, 1960 for the purpose of receiving evidence on the issues raised by the Complaint and making findings and recommendations to the Court with regard to what disciplinary action, if any, said Court should take against the petitioner. At these hearings the Deputy Attorney General, for his opening statement, read the Formal Complaint and the Court's opinions in the two civil actions referred to above, and said at page 26 of the Record,

"Now, it was upon records in those two cases that this proceeding, this action, is based. We will shortly offer the records in evidence and rest."

Timely and proper objection was made to the reading of said opinions. (R. 4 to 26). The Deputy Attorney General did in fact offer as evidence only the testimony of the Clerk of said Court identifying said records and the records themselves. The records were admitted into evidence over objection, and the Deputy Attorney General rested his case. Petitioner's Motion to Dismiss was denied. In his defense the petitioner testified himself, produced ten witnesses whose testimony corroborated his own, and introduced into evidence a number of documents. This evidence tended to prove that the civil actions in question were groundless and that the witnesses who testified therein to the contrary were not reliable. (R. 65 to 438 and exhibits).

On April 25, 1960, the Grievance Committee, giving probative weight to the evidence and findings in the two civil cases, found the petitioner guilty of misconduct and recommended to the Court that it disbar the petitioner. Petitioner filed exceptions thereto, urging again his rights under the Fourteenth Amendment.

On August 21, 1961, the petitioner was disbarred by the Supreme Court of the State of Colorado, that Court again basing its opinion and judgment on the evidence and findings in the civil cases. (See Appendix B for opinion). Petitioner's Motion for Rehearing was denied on September 5, 1961. (See Appendix C).

IV. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The decisions of the Supreme Court of the State of Colorado suspending and disbarring petitioner ignored and deprived him of his rights to due process of law and equal protection of the laws as guaranteed him under Section 1 of the Fourteenth Amendment of the United States Constitution in that they were based on Disciplinary Proceedings in which the Complaint was legally defective and failed to apprise the petitioner of charges of misconduct.

2. The said decisions of the Court below ignored and denied said constitutional rights of petitioner in that at no time in the proceeding on which they were based was petitioner given the opportunity to confront, cross-examine and impeach witnesses upon whose former statements suspension and disbarment were founded.

3. The Disciplinary Proceeding against the petitioner was unfair to petitioner in that it contained a highly damaging and prejudicial error in permitting the prosecutor to make an opening statement consisting almost entirely of a reading of the same Court's opinions in two unrelated civil actions against the petitioner involving some of the same facts but different parties, different issues, a less exacting burden of proof and different kinds of relief than the instant proceeding; and the decisions of suspension and disbarment based thereon ignored and deprived the petitioner of his rights to due process of law and equal protection of the laws guaranteed to him by the Fourteenth Amendment.

4. The decisions below suspending and disbarring petitioner were based solely upon the evidence and

findings of other cases in violation of the Colorado law to which the Court had committed itself by its own rules, and accordingly the decisions deprived petitioner of his rights to due process of law and equal protection of the laws afforded by the Fourteenth Amendment.

5. The decisions of the Supreme Court of the State of Colorado suspending and disbarring petitioner violated Section 1 of the Fourteenth Amendment in that they were founded upon a judicial proceeding in which the Complaint was legally defective and failed to give notice of charges of misconduct; the evidence against petitioner was incompetent and without probative value; petitioner was denied the right to confront, cross-examine and impeach witnesses against him; and, in the case of disbarment, the prosecutor was permitted in his opening statement to read improper, incompetent and highly prejudicial material.

V. ARGUMENTS AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A. The Formal Complaint in the Disciplinary Proceeding Against the Petitioner Failed to Give Notice to Him of Any Charges of Such a Nature as to Result in Suspension From the Bar or Disbarment Since It Contained No Allegation of Misconduct or Unprofessional Behavior by the Petitioner, and Hearings Held Pursuant Thereto and Suspension and Disbarment Based on Said Complaint Deprived the Petitioner of Property Without Due Process of Law and Denied Him Equal Protection of the Laws

In the instant case, the petitioner's right to practice law was suspended and ultimately terminated by the Supreme Court of the State of Colorado. While this right is not absolute neither is it merely a matter of grace revocable at will. The years of education undertaken in anticipation of it and the compensation it can

bring to its practitioners give to it the character of property within the meaning of the due process clause of Section 1 of the Fourteenth Amendment of the United States Constitution. *Ex parte Wall*, 107 U.S. 265; *Montgomery County Bar Ass'n.* v. *Rinalducci*, 329 Pa. 296, 197 A. 924 (1938).

Due process of law required that professional discipline of an attorney be founded on his misconduct or unprofessional behavior. *Ex parte Robinson*, 19 Wallace 505. An attorney who has done nothing objectionable is not subject to discipline. It further requires that professional discipline be preceded by notice to the attorney of the specific acts of misconduct with which he is charged. *Bradley* v. *Fisher*, 13 Wallace 335; *United States* v. *Hicks*, 37 F.(2d) 289 (9th Cir. 1930). From the above it is apparent that an attorney cannot be deprived of his license to practice law unless notified in advance thereof of charges of specific misconduct. In the instant case, no allegation of misconduct or unprofessional behavior was made at all. The charges against the petitioner were simply that certain records exist and certain events took place which make it "appear" that the petitioner was guilty of misconduct. Such charges go not to the petitioner's conduct but to his reputation, a reputation which may or may not be justified. Since notice was of charges which, if proven, would not warrant discipline (see *In re Rice*, 167 Okla. 330, 29 P.(2d) 599, 1934), suspension from the Bar and disbarment based thereon deprived the petitioner of property without due process of law.

Further, Colorado Statutes and the Rules of Civil Procedure promulgated by the Supreme Court of the State of Colorado itself require that an attorney be

charged with specific acts of "misconduct" or "malconduct" before being disciplined. Colorado Revised Statutes, 1953, 12-1-8 and 9, and Colorado Rules of Civil Procedure Chapter 20, § 247. The Court's suspension and disbarment of the petitioner without such charges in violation of the laws of the State and the Court's own rules not only contravened Article II, Colorado §§ 6 and 25 of the Colorado Constitution guaranteeing its citizens "equality of justice" and "due process of law" but offended Section 1 of the Fourteenth Amendment of the Constitution of the United States and the Act of May 31, 1870, c. 114, § 16, 16 Stat. 144, 42 U.S.C. 1981 guaranteeing equal protection of the laws.

B. At No Time in the Course of the Disciplinary Proceeding Were the Persons Upon Whose Testimony Suspension and Disbarment Were Based Brought Before the Petitioner So That He Could Confront, Cross-Examine and Impeach Them and Otherwise Demonstrate the Unreliability of Their Testimony, and Suspension and Disbarment Based on Such a Proceeding Deprived Petitioner of Property Without Due Process of Law and Denied Him Equal Protection of the Laws

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver*, 333 U.S. 257, 273.

"In other words, he must in advance be informed of the purpose of the proceeding and of the grounds therefor, and be afforded a fair opportunity to interrogate the witnesses testifying against him and to produce evidence in refutation or rebuttal. These are indispensable requirements. . . ." *United States* v. *Hicks*, supra.

"Due process of law in such cases requires specific charges, due notice of the same, an opportunity to make specific answers to them, an opportunity to cross-examine the witnesses in support of them, an opportunity to adduce testimony in contradiction of them, and an opportunity for argument upon the law and facts." *Garfield* v. *United States ex rel Spalding*, 32 App. D.C. 153, 158 (1908); certiorari denied 212 U.S. 584.

The Court's refusal to grant the petitioner this most fundamental right in accordance with the laws and Constitution of the State of Colorado denied to petitioner equal protection of the laws.

C. The Deputy Attorney General Was Permitted, Over Objection, to Make an Opening Statement Consisting Almost Entirely of a Reading of Court Opinions in Two Unrelated Civil Actions Involving Some of the Same Facts But Different Parties, Different Issues, a Less Exacting Burden of Proof and Different Kinds of Relief Than the Instant Proceeding, With a severely Prejudicial Effect on the Petioner's Cause, and Disbarment Based on Such Proceeding Deprived the Petitioner of Property Without Due Process of Law and Denied Him Equal Protection of the Laws

Section 251 of the Rules of Civil Procedure of the Supreme Court of the State of Colorado provides that, with certain exceptions not material to this case, "hearings on formal complaints shall be conducted in conformity with the practice in the trial of civil actions." The law in Colorado is clear that opening statements must be confined to matters properly subject to proof and consideration by the Court. *Carr* v. *Boyd*, 123 Colo. 350, 229 P.(2d) 659 (1951); *Mulligan* v. *Smith*, 32 Colo. 404, 76 P. 1063 (1904); *Burke* v. *South Boulder Canon Ditch Co.*, 76 Colo. 354, 231 P. 674 (1925). And while there are

no Colorado cases on the point, both reason and precedent elsewhere (*Gulf, Mobile & Northern R. Co.* v. *Weldy*, 195 Miss. 345, 14 So. (2d) 340 (1943); *Fox* v. *Schaeffer*, 131 Conn. 439, 41 A. 2d 46, 157 A. L. R. 132, (1944); *Jones* v. *Teal*, 57 S. W. (2d) 617 (C.C.A. Tex. 1933), affirmed 126 Tex. 480, 89 S. W. (2d) 987) prohibit consideration in one trial of conclusions reached in another even though the other trial involved the same facts or was held in the same court by the same judge. Hence, it is improper to read judicial opinions in an opening statement since they could not be received or considered as probative evidence of the conclusions they state.

In the instant case the impropriety is rendered much more grave by the fact that the opinions were of the Court to which the Grievance Committee was to report and were written by the Chief Justice of that Court who found in those civil actions that petitioner had committed acts which, if proven in a Disciplinary Proceeding, would warrant firm disciplinary action. The opinions, as read in the opening statement, were virtually a mandate to the Grievance Committee by the Chief Justice of the Court, it served to find against the petitioner.

Clearly, the procedure offends the "due process" clause, and, inasmuch as the Court, through its Committee, refused to comply with its own rules and the case law and Constitution of the State of Colorado, it also offends the "equal protection" clause.

D. In Suspending From the Bar and in Disbarring the Petitioner By Giving Probative Weight to Evidence and Findings of Misconduct Appearing in Unrelated Civil Actions Involving Some of the Same Facts But Different Parties, Different Issues, a Less Exacting Burden of Proof, and Different Kinds of Relief Than the Instant Proceeding, the Supreme Court of the State of Colorado Deprived the Petitioner of Property Without Due Process of Law and Denied Him Equal Protection of the Laws

While a court can take judicial notice of the existence of its records, this notice does not extend to the facts and conclusions therefrom upon which its judicial actions were based. It can take notice that it has declared a deed void or that the contest before it has already been decided by it in another proceeding and is *res judicata*, but it has no authority to take the proof from one case and give it probative value in another. *Becker Steel Co. of America* v. *Cummings*, 16 F. Supp. 601 (S.D. N.Y. 1936); *Interstate Co.* v. *Jolly*, 156 Miss. 199, 125 So. 406 (1930), suggestion of error overruled 156 Miss. 199, 125 So. 838; *Illinois Cent. R. Co.* v. *Walker*, 116 Miss. 431, 77 So. 191 (1918); *Armstrong* v. *Jones*, 198 Miss. 627, 22 So. (2d) 7 (1945); *Scott* v. *Clark*, 38 S.W. (2d) 382 (C.C.A. Tex. 1931); *Grayson* v. *Rodermund*, 135 S.W. (2d) 178 (C.C.A. Tex. 1939). See also *Fox* v. *Schaeffer*, supra.

The only other reasonable theory upon which probative weight could be given to any part of the records of the two civil cases is that the testimony therein is admissible as testimony given at a former trial. But this is not the Colorado law. The Supreme Court of the State of Colorado, in the case of *Rio Grande Southern R. Co.* v. *Campbell*, 55 Colo. 493, 136 P. 68 (1913), said at page 68, "In 2 Wigmore on Evidence, Section 1415, it is said: 'No one has ever doubted that the former testimony of a witness cannot be used if the

witness is still available for the purpose of testifying at the present trial.' What Weller said on the first trial was hearsay on the second trial, and could not be introduced as substantive evidence by the party calling him, unless it came within some well established exception to the rule regarding hearsay evidence. Merely because it was given at a former trial of the same case involving the same issues and between the same parties, where the witness was cross-examined, did not make it admissible as his evidence on this trial. Instead of plaintiff making his case by evidence given on this trial, he was permitted to do so by evidence given at another trial." The Colorado rule prohibits admission of former testimony unless a showing is made that the witness could not testify in the present proceeding either in open court or on deposition. *Bolles v. O'Brien*, 59 Colo. 261, 151 P. 450 (1915); *Daniels v. Stock*, 23 Colo. App. 529, 130 P. 1031 (1913); *Magnes v. Sioux City Nursery and Seed Co.*, 14 Colo. App. 219, 59 P. 879 (1900). Such a showing was not even attempted.

The findings in the instant Disciplinary Proceeding were based solely upon the evidence and findings of other cases in violation of the Colorado law to which the Court had committed itself by its rules and in violation of its rule contained in Chapter 20, § 254 of its Rules of Civil Procedure requiring that "the charges be established by substantial, clear, convincing and satisfactory evidence." Loss of the right to practice law based the evidence and findings in other unrelated civil actions denied the petitioner due process of law and the equal protection of the laws.

E. The Above Procedures Collectively Prevented the Disciplinary Proceeding From Being a Fair Hearing, and Suspension and Disbarment Based Thereon Deprived the Petitioner of Property Without Due Process of Law and Denied Him Equal Protection of the Laws

Basing suspension from the Bar and disbarment upon an insufficient Complaint, an improper opening statement, and records not having probative evidentiary value with the result that the petitioner was denied the opportunity to interrogate his accusers in this Disciplinary Proceeding cumulatively had the effect of rendering the proceeding unfair and in violation of due process, and the Court's systematic refusal to obey its own rules or the laws or Constitution of the State of Colorado was not equal protection of the laws.

VI. CONCLUSION

Certainly, it is a fundamental principle of justice that in holding a judicial hearing upon which a member of the Bar may be deprived of his license to pursue his profession, a court must follow a procedure which affords the attorney a fair opportunity to refute the charges made against him, and denial to the petitioner by the Court below of such opportunity by systematically violating its own rules and the case law, Statutes and Constitution of the State of Colorado rendered its suspension and disbarment of the petitioner offensive to the due process of law and the equal protection of the laws provisions of Section 1 of the Fourteenth Amendment of the United States Constitution.

Accordingly, petitioner prays this Honorable Court grant a writ of certiorari to the Supreme Court of the State of Colorado.

Respectfully submitted,

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